

SUBJECT: **Guidance Memo No. 07-2005 Guidance for Determining Voluntary Remediation Program Eligibility at Solid Waste Management Facilities that operated prior to December 21, 1988.**

TO: Waste Program Managers and staff

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DATE:

COPIES: Office of Waste Permitting, Regional Waste Programs, Solid Waste Compliance and Enforcement Coordinators, Voluntary Remediation Program

I. Introduction

This guidance is provided to ensure consistency when evaluating VRP eligibility for solid waste sites under 9 VAC 20-160-30.E.

II. Background and Purpose

The Voluntary Remediation Program (VRP) was established to allow owners or others having interests in contaminated property to voluntarily remediate existing contaminants and constituent releases. Some states have established a mandated reporting requirement and clean-up "action level" for existing contamination or that discovered through environmental assessments. Virginia has no equivalent requirement, but has established the state Voluntary Remediation Program (VRP) to meet this need. Sites are eligible for the VRP only when remediation is not clearly mandated under other program authorities. VRP eligibility is determined after the VRP application is reviewed by appropriate regulatory programs to determine if action is required under those program authorities. Actual application to VRP is required prior to any consideration for eligibility review by other programs. Should the site be determined ineligible for the VRP program, it should be understood that subsequent remediation action may be required by other program areas through the compliance and enforcement processes, including but not limited to RCRA Subtitle C Corrective Action, CERCLA, RCRA Subtitle C Hazardous Waste, or the Virginia Solid Waste Management Program. If no direct program action is mandated, VRP eligibility may be established for the subject site.

The Virginia Solid Waste Management Regulations (VSWMR), in part, defines unpermitted sites and open dumps and outline respective remedial requirements. These remedial requirements are mandated by federal and state law through the VSWMR. Thus, unpermitted solid waste management facilities and open dump sites are generally not eligible for VRP participation. However, a provision in the VRP allows solid waste sites to participate in the VRP provided that applicable program jurisdiction has been waived by the director.

To ensure program consistency, this guidance outlines our protocol to make a VRP eligibility determination for solid waste management sites and discusses VSWMR applicability requirements, including acceptable parameters to consider for VRP eligibility when evaluating solid waste sites. Further, it clarifies that VSWMR jurisdiction should be waived only by the director (or his designee) under specific circumstances which ensure that VRP requirements meet the substantive requirements of the VSWMR, so that any potential end use(s) of the property may occur without the need for further DEQ oversight or reliance upon institutional controls, which are not recognized or supported by the VSWMR.

III. Guidance

Statutory and Regulatory Criteria

Solid waste sites are facilities, units, or locations which have historically treated, stored, disposed of, or have been used for disposal of solid waste. Previous waste management activities may have occurred in a manner which allowed, intentionally or otherwise, solid waste(s) to be placed, discharged, deposited, injected, dumped, or spilled onto the ground. These sites may or may not have operated under a solid waste management permit issued by the Commonwealth of Virginia, although some sites may have also operated under a regulatory exemption or conditional exclusion.

The VSWMR, in part, set forth criteria and standards which are used to determine whether a solid waste management facility or site creates a substantial present or potential hazard to human health or the environment, including contamination of air, land, surface water or groundwater, and sets requirements for cleanup and corrective action to remediate releases as a result of improper waste management. The VSWMR provides for identification of unpermitted facilities and open dumps under Part II and Part IV, respectively, and requires appropriate remedial actions under 9 VAC 20-80-210.

VSWMR applicability to solid waste management sites is based on several criteria :

- 1) Did the site manage solid waste without having obtained a permit? *The site may be subject to the requirements of VSWMR 9 VAC 20-80-90.*
- 2) Was solid waste managed under a permit or conditional exemption/exclusion and has a release occurred which meets open dump criteria? *The site may be subject to the requirements of VSWMR 9 VAC 20-80-180 and 190.*
- 3) Did the site manage solid waste prior to the effective date of the VSWMR and has a release or condition occurred which meets open dump criteria? *The site may be subject to the requirements of VSWMR 9 VAC 20-80-60.F.*

Because the VRP regulations state that sites are eligible for VRP participation only when remediation is not clearly mandated under other programs, a site that managed solid waste may be eligible for VRP if remediation is not clearly mandated by the VSWMR. Thus, a solid waste site meeting any open dump criteria or that is an unpermitted facility would not be eligible for the VRP unless program authority jurisdiction has been waived by the director. Regardless of whether a solid waste site operated with or without a permit, any solid waste site must always be evaluated to determine whether it meets any open dump criteria.

Eligibility Criteria

It is the primary responsibility of applicants to determine whether remediation of their site is mandated under the VSWMR. Remediation is mandated when the site is an unpermitted facility or an open dump. To be eligible for VRP consideration without a waiver, the site must:

- 1) Not have operated without a permit (and was supposed to have one); and
- 2) Have no release or other condition due to solid waste management which constitutes an open dump.

To determine if a site is an unpermitted facility, the applicant would need to compare the date(s) of operation and type of waste management activity to the contemporary regulations for period of activity and the applicable permitting requirements. Virginia implemented solid waste regulations on April 1, 1971. On December 21, 1988, expanded regulations were promulgated requiring a permit to treat, store, or dispose of solid waste. The expanded regulations also included several exclusions or conditional exemptions from permit requirements.

To determine if a site is an open dump, the applicant would need to compare site conditions to the “open dump” criteria in VSWMR Section 9 VAC 20-80-180. From a practical perspective, a site characterization study will be necessary to properly evaluate open dump criteria. Site characterization should include, at a minimum, an evaluation of any releases of decomposition gas, discharges to surface waters, releases of hazardous constituents to groundwater (i.e., exceedence of MCL at waste unit boundary), and a site history.

If, as a result of waste management activities, releases are indicated that meet any open dump criteria the site would be subject to VSWMR requirements and ineligible for VRP participation unless jurisdiction is waived by the director. Owners of sites who have determined they are subject to the VSWMR who wish to make voluntary disclosure of non-compliance would normally seek to remediate their property under authority of the VSWMR through a “non penalty” consent order. However, to encourage site owners to voluntarily evaluate and remediate sites that may not otherwise be brought forward, the department may consider certain solid waste sites eligible for participation in the VRP through a waiver of the VSWMR, provided the substantive requirements of the VSWMR are met as outlined below.

Waiver Criteria

It is important to recognize that any waiver of VSWMR jurisdiction must ensure that final site remediation meets the established remediation standards of the VSWMR, and allows future site use without the need for further DEQ oversight or use of institutional controls. Accordingly, it is generally not appropriate to waive VSWMR jurisdiction for sites which have a release(s) meeting open dump criteria or for which future development or use of the site may result in the creation of open dump circumstances, such as through decomposition gas migration into structures built upon or near disposal areas, actual or potential exposure to hazardous constituents through groundwater use, or creation of a point source or non-point source discharge to surface water. A waiver of VSWMR jurisdiction may be acceptable for an unpermitted site where an open dump circumstance does not exist and remediation of all waste and residual contamination will be addressed through cleanup, removal, and proper management.

The following table outlines general criteria which should be considered when determining if management through VRP is acceptable.

VRP Eligibility Criteria		
	Release ? Open Dump Criteria	Release = Open Dump Criteria
Excluded/Conditionally Exempted or Unpermitted site	Yes*	No
Permitted site	Yes	No*
<i>* Allowed only through conditional waiver</i>		

It should be noted that DEQ is under no obligation to waive VSWMR jurisdiction for any solid waste site. Waivers will only be considered for sites which can be practicably remediated under the VRP to attain final conditions where future use of the property can occur without the need for further DEQ oversight or use of institutional controls. Typically, this would include unpermitted sites that treated, stored, or disposed of limited amounts of solid waste and have minor releases which can be addressed through cleanup, removal, and proper management. This would not include unpermitted or permitted disposal sites where solid waste and residual contamination can not be practicably removed and must be closed in-place, requiring long term maintenance and monitoring. Therefore, any waiver consideration should include the appropriate conditions necessary to ensure that remediation under VRP will include cleanup, removal, and proper management of solid waste (and any residual contamination) in accordance with the substantive requirements of the VSWMR.

There may be occasions where the VRP is the most expeditious method to accomplish remediation of a disposal site in a manner equivalent to VSWMR standards even when limited open dump criteria exist, and waiver should be considered. For example, in determining whether a site with groundwater MCL exceedences should be managed as an open dump under the VSWMR or allowed to participate in the VRP, the following should be considered:

- 1) Remedial Action criteria under 9 VAC 20-80-210,
- 2) Action Levels and Cleanup Standards under 9 VAC 20-80-220 & 230,
- 3) Severity of exceedence over applicable standard,
- 4) Potential for future severity of the release(s),
- 5) Actual or potential impact to receptors,
- 6) Rapidity of developing and implementing remedial action(s) under the VSWMR verses the VRP,
- 7) Relative rapidity of getting the facility into the respective program and willingness of the facility to put forth funds and effort to complete remediation of the site.

The Director may require additional information to determine if a waiver is appropriate or set specific conditions for VRP eligibility based on the applicability of the open dump criteria, as determined by solid waste program staff. A VRP Certificate of Satisfactory Completion of Remediation will be delayed until the substantive requirements of the VSWMR are met. VRP staff should consult and coordinate with VSWMR staff as necessary to ensure compliance with applicable VSWMR requirements.

New or Additional Information Discovered after VRP Eligibility Determination

If new or additional information becomes available after a site has been deemed eligible for the VRP that would have impacted a site eligibility decision, or if remediation activity creates a condition that would make the site ineligible for current consideration, continued VRP participation is not necessarily jeopardized. However, site remediation steps required to obtain a VRP Certificate of Satisfactory Completion will need to be modified to meet standards applicable to a VRP site participating under waiver from the VSWMR. The director will notify the facility that VRP participation may be terminated or require modification to meet appropriate care requirements, and provide an explanation of the reasons. The participant will have 30 days to submit additional information to address the Agency's concerns, or accept the director's determination and modify their proposed actions accordingly.

In implementing the above provision, a distinction should be made between new and additional information:

New information may include previously undisclosed information which was known, available, or should have been known or available prior to or during VRP eligibility consideration, including information about additional waste management units, the nature or extent of contamination at the property, or site conditions that may have subjected the site to VSWMR requirements as identified by Phase I or Phase II site assessment. Thus, it is critically important for applicants to the VRP to include all information available to them at the time of initial eligibility consideration. New information that would impact an eligibility decision should be considered appropriate cause to remand the site to VSWMR authority. Although such facilities may appeal to continue in the VRP, they must undergo a new VSWMR waiver evaluation by solid waste compliance, groundwater and VRP staff to determine if a waiver is appropriate for continued VRP eligibility.

Additional information may be generated subsequent to a site's acceptance into the VRP as a result of remedial investigations to broaden the scope and understanding of site conditions prior to clean up activities, or may be information that was not known at the time of VRP eligibility determination but was determined after initiating site activities, or is created as a result of clean up activities. Additional information may also include discovery or creation of explosive gas situations, surface water discharges in violation of VPDES/VPA, or groundwater contamination above the Safe Drinking Water Act Maximum Contaminant Level (MCL).

Additional information which indicates a site is an open dump should not be considered cause for removal of an accepted site from the VRP, but site remediation must address adequate care of all open dump issues under the VSWMR substantive remedial requirements, in addition to any other planned remediation activities. However, any changes in site conditions during VRP participation which increases the amount of solid waste on site or contributes to releases of existing contamination may trigger VSWMR authorities if VRP remediation actions cannot demonstrate adequate care to ensure VSWMR equivalency to protect human health and the environment.

For example, if releases to groundwater over MCL limits are discovered, VRP remediation goals must meet the remediation standards of the VSWMR. This would include the MCL (where established) or an alternate concentration limit (for non-MCL constituents) consistent with the VSWMR and solid waste program guidance. Again, the goal is to ensure that these sites continue with their voluntary remediation efforts, but VRP standards must now satisfy VSWMR program requirements. This will ensure adequate site care to protect human health and the environment so that future uses of the site can proceed without the need for additional DEQ oversight or institutional controls.

Summary

Former solid waste sites may be appropriate for development where solid waste and residual contamination can be practicably cleaned up, removed and properly managed. Such properties may be amenable to remediation under the VRP so that they can be restored to useful service. However, development on or near property used for solid waste management or disposal would not be acceptable in situations where continued presence of solid waste(s), hazardous constituents in the soil or groundwater, the presence of explosive decomposition gases, or discharges to surface water have not been managed with appropriate care. This guidance establishes a protocol

for when it would be appropriate to waive VSWMR jurisdiction to allow VRP remediation by those who voluntarily offer to complete clean up actions.

Solid waste sites that operated prior to 12/21/88 may generally be considered conditionally eligible for VRP participation provided there are no release(s) which constitute an open dump. For unpermitted sites to participate in VRP, a waiver of VSWMR jurisdiction is necessary, under the condition that remediation through VRP meet all substantive requirements of the VSWMR under 9 VAC 20-80-210.A. It would generally not include sites subject to closure in-place (with long term maintenance and monitoring) or alternate remedial activities under 9 VAC 20-80-210.B or C, as those activities are more properly addressed under full VSWMR authorities and do not serve the VRP goal of expediting return of the land to active use.

Waivers establishing VRP eligibility for former sites exhibiting open dump situations are expected to be rare. Site owners should be made aware that, in these cases, their sites will most likely be considered ineligible for VRP participation and remediation will be required under the VSWMR authorities.

It must also be recognized that the Director is not required, nor is he under any obligation, to waive VSWMR jurisdiction for any solid waste site to allow participation in the VRP. In order for DEQ to make a VRP eligibility determination, site owners must provide adequate information to allow for determination of VSWMR applicability and have actually applied to the VRP. Failure to do so may cause delays in VRP eligibility review or have more serious consequences after the fact. Potential applicants should rely on the advice of their environmental consultants and legal counsel to assist them with eligibility determinations for their site if they are merely considering application rather than making actual application to the VRP. Any waiver of VSWMR jurisdiction to allow participation in the VRP should be understood to be only under the condition that all substantive requirements of the VSWMR will be met through VRP.

Clean land, air, and water are important to the people of Virginia and it is expected that whenever voluntary remediation occurs at solid waste management facilities, the end result is property which is suitable for occupation and use without restriction. Nothing in this guidance prohibits site owner/operators from taking any actions on their own accord to correct site deficiencies that may preclude VRP eligibility.

Authorization Citations and Links

Virginia Administrative Code

Va. Code §10.1-1429

Va. Code §2.2-4000, *et seq.*

Va. Code §10.1-1408.1.H

Virginia Solid Waste Management Regulations

9 VAC 20-160-130

9 VAC 20-80-60.F

9 VAC 20-80-90

9 VAC 20-80-80

9 VAC 20-80-210

9 VAC 20-80-180

9 VAC 20-80-220

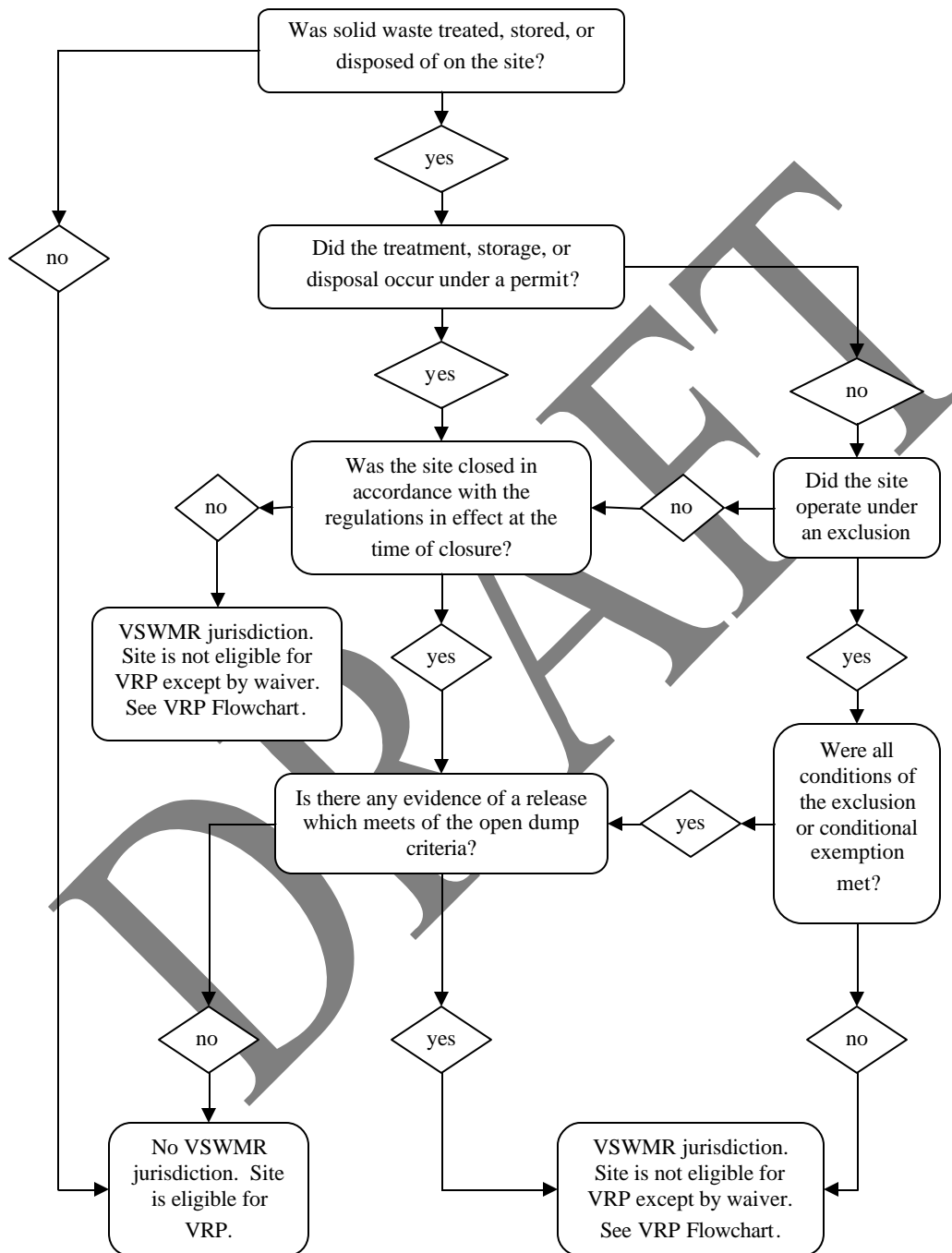
9 VAC 20-80-230

IV. Collaboration Process

This guidance was prepared after extensive discussions with Solid Waste and VRP Program management and staff. Final version was agreed upon by Shawn Davis, Kevin Greene, and Robert Weld on May 20, 2005. The final version was sent to Regional Office for comment on May 27, 2005. This version was discussed with Regional Waste Program Manager's on May 30 and June 1, 2005. Comment period closed on July 16, 2005. No further comments were received from Program managers or staff.

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Flowchart to Determine VSWMR Applicability



Flowchart to Consider VSWMR Waiver Criteria for VRP Participation

